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CITATIONS

Cases:

417-729—71——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

NASH-FINCH COMPANY, D/B/A
JACK AND JILL STORES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–27) is not yet officially reported. The memorandum and order of the district court (App. B, *infra*, pp. 30–40) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1970 (App. A, *infra*, pp. 28–29). The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an agency of the United States is within the governmental exception to the statute which ordinarily prohibits federal courts from enjoining state court proceedings, 28 U.S.C. 2283, so that the National Labor Relations Board may, through proceedings in a federal court, enjoin the implementation of a state court order which regulates peaceful picketing governed exclusively by the National Labor Relations Act.

STATUTES INVOLVED

28 U.S.C. 2283 provides as follows:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Also relevant are portions of the Nebraska anti-picketing statute, which are set out at App. D, *infra,* pp. 43–44.

STATEMENT

A. THE UNDERLYING FACTS

In August 1968, District Union 271, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, began an organizing campaign among the meat department employees of the Jack and Jill ("Company") stores in Grand Island, Nebraska (App. A, *infra,* p. 16; A. 11).[1] In October 1968, the Union

[1] "A." refers to the portion of the record printed as an appendix to the briefs in the court of appeals.

filed unfair labor practice charges against the Company alleging violations of Section 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. 158 (a)(1) and (5)); a complaint was issued (App. A, *infra,* p. 17; A. 10). In April 1969, after hearing, the Trial Examiner sustained the complaint, finding that the Company had violated those provisions of the Act by refusing to bargain with the Union, and by suggesting "the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation" (App. A, *infra,* p. 17; A. 26–27). The Trial Examiner recommended that the Company be ordered to cease and desist from the unfair labor practices found and from any like or related conduct, and to bargain with the Union (App. A, *infra,* pp. 17–18; A. 27).

Approximately one month after issuance of the Trial Examiner's decision, the Union began picketing the Company's stores with signs advising the public that the Union was striking in protest against the Company's unfair labor practices (App. A, *infra,* p. 18; A. 30, 31). The Union also distributed handbills to passers-by which stated, in part, that the Company refused to bargain "or comply with other findings and recommendations of a trial examiner of the National Labor Relations Board," and urged members of the public not to shop at the Company's stores (App. A, *infra,* p. 18; A. 34).

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for an injunction against the Union, its officers, and certain individual pickets (App. A, *infra,* p. 18; A. 30–34). The petition alleged that the Union was engaging in "mass picketing" in violation of Nebraska law, by picketing with more than two pickets within 50 feet of each other and by blocking entry to and exit from the stores; that, insofar as the signs and handbills represented that a strike existed and that the Company was engaged in unfair labor practice activity, they were false and malicious in further violation of state law; and that the pickets had threatened customers with property loss, had used profane and vulgar language, and had slandered the Company's business reputation (App. A, *infra,* p. 18; A. 31–32).

The state court issued a temporary restraining order, and then, overruling the Union's motion to vacate, a temporary injunction (App. A, *infra,* pp. 18–19; A. 35–36, 7–9). The injunction, which remains in effect, limits pickets to two at each of the Company's stores, and enjoins them from blocking or picketing entrances or exits to the store, and from distributing handbills or literature pertaining to the dispute in any manner which would halt or slow the movement of traffic (App. C, *infra,* p. 42; A. 8). The injunction also bars (1) anyone other than a bona fide member of the Union from picketing unless that person first submits himself to the jurisdiction of the state court by becoming a defendant in the proceedings; (2) pickets from instigating conversations with the Company's customers in any manner relating to the dispute; (3) pick-

ets from "[d]oing any act in violation of Sections 28–812, 28–814.01 and 28–814.02 R.S. Neb. 1964";[2] and (4) anyone, other than pickets or named defendants, from picketing, handbilling, or otherwise "caus[ing] to be published or broadcast any information pertaining to the dispute * * * between the parties" (App. C, *infra,* p. 42; A. 8–9).

In September 1969, several months after this injunction was obtained, the Board announced its decision accepting in part and rejecting in part the Trial Examiner's recommendations.[3]

B. THE FEDERAL COURT PROCEEDINGS

On August 29, 1969, the Board filed suit in the federal district court in Nebraska for an injunction to restrain the Company from enforcing the provisions of the state court injunction described in (1) to (4), *supra,* on the ground that they regulated conduct which was governed exclusively by the National Labor Relations Act (App. A, *infra,* p. 19; A. 6, 37–38). The district court denied the Board's motion for a preliminary injunction and granted the Company's motion to dismiss the complaint (App. B, *infra,* pp. 30–40). Although noting that the Union's picketing "may be within the exclusive jurisdiction of the N.L.R.B.," it

[2] These provisions are discussed in n. 8, *infra.*

[3] The Board sustained the Examiner's Section 8(a)(1) findings and his remedy therefor, but rejected his findings of an unlawful refusal to bargain and his recommended bargaining order. Respecting the latter, the Board found the Union's showing of majority status deficient. 178 NLRB No. 77, 72 LRRM 1144. The Company subsequently complied with the Board's decision.

concluded that it did not "have the power by virtue of the limitations imposed upon it by [28 U.S.C.] section 2283 to issue the [Board's] requested relief" (App. B, *infra,* pp. 34, 38). Section 2283, in general, prohibits federal courts from interfering with state court proceedings. The district court rejected the Board's contention that it was within the governmental exception to Section 2283 recognized in *Leiter Minerals* v. *United States,* 352 U.S. 220 (App. B, *infra,* pp. 32–33).

The Eighth Circuit affirmed (App. A, *infra,* pp. 15–27). Although recognizing 'that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings," the court adhered to an earlier holding, *National Labor Relations Board* v. *Swift & Co.,* 233 F. 2d 226, 232, that, "for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States" (App. A, *infra,* pp. 20, 22). Since the Board could not avoid the prohibitions of Section 2283 on the basis of any of its other exceptions, an injunction against the state court proceeding was barred (App. A, *infra,* pp. 22–27).

REASONS FOR GRANTING THE WRIT

1. The Eighth Circuit's holding is in conflict with the decision of the Fifth Circuit in *National Labor Relations Board* v. *Roywood Corp.,* 429 F. 2d 964, on the important question whether agencies of the United States such as the Board are within the implied governmental exception to 28 U.S.C. 2283, which ordi-

narily prohibits federal courts from interfering in state court proceedings.

The governmental exception is separate and apart from those specifically referred to in Section 2283, such as an injunction "to protect or effectuate [a federal court's] judgments," and only the governmental exception is possibly relevant here. It was articulated in a case brought in the name of the United States. *Leiter Minerals* v. *United States,* 352 U.S. 220. Since, like other federal agencies, the Board sues in its own name and not that of the United States, the Eighth Circuit concluded here that the Board is not the United States for purposes of the governmental exception to Section 2283. In *Roywood,* on the other hand, the Fifth Circuit held that a Board injunction action does fall within that exception:

> When the Board * * * sues, it need not fit its case into one of the confining exceptions of section 2283, nor need it bear the heavy burden of showing its case "exceptional" in immediate impact between the parties to the dispute. It sues not as a private party but as an agency of the United States Government charged with administering the national labor laws * * *. [429 F. 2d at 970.]

The facts of *Roywood* are essentially similar to the facts of this case. The employer sought and obtained a state court injunction barring peaceful picketing on the ground that the pickets' signs and handbills contained libelous statements. The Board's Regional Director had previously determined that this activity did not warrant a complaint under the Act, and thus

was not contrary to an informal settlement agreement which he and the union had made following earlier picketing activity which he believed did violate the Act's secondary boycott provisions. Where the Eighth Circuit permitted the state court injunction to remain in force, the Fifth Circuit held that Section 2283 did not bar a Board suit to prevent enforcement of the state court injunction.

2. The question whether federal courts, at a federal agency's behest, may enjoin state court intrusions into an exclusively federal jurisdiction in cases in which the specific statutory exceptions of Section 2283 are not met is one which has not been, but should be, decided by this Court.

This question was left open in *Capital Service, Inc.* v. *National Labor Relations Board,* 347 U.S. 501. There an employer obtained a state court injunction banning union picketing activity, and then filed an unfair labor practice charge with the Board respecting the same activity. The Board's Regional Director found that some of the activity violated the secondary boycott provisions of the National Labor Relations Act, but that the rest was permissible under the Act. He petitioned a federal district court under Section 10(l) of the Act (29 U.S.C. 160(l)) for an injunction restraining the union from engaging in the former conduct, and simultaneously asked the federal court to enjoin the employer from enforcing the state court injunction. This Court found Section 2283 was no bar to the Board's suit respecting the state court proceeding because the relief requested was "necessary in aid of [the district court's] jurisdiction." 347 U.S. at

505. Accordingly, the Court found it "unnecessary to consider whether, apart from the specific exceptions contained in § 2283, the District Court was justified in enjoining the instrusion on an exclusive federal jurisdiction." *Ibid.*, n. 2.

The holding below conflicts in principle with *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220. There, this Court held that Section 2283 did not bar a suit by the United States to enjoin a state court proceeding brought by a person seeking mineral rights in land owned by the United States, stating (*id.* at 225–226):

> The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties [4] which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest. The frustration of superior federal interests which would ensue from precluding the Federal Government from obtaining a stay of state court proceedings except under the severe restrictions of 28 U.S.C. § 2283 would be so great that we cannot reasonably impute such a purpose to Congress from the general language of 28 U.S.C. § 2283 alone. * * *

Although *Leiter* involved a suit by the United States itself rather than one of its agencies, the rationale of that decision is equally applicable to federal agencies

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[4] *E.g.*, *Amalgamated Clothing Workers* v. *Richman Bros.*, 348 U.S. 511; *Atlantic Coast Line R. Co.* v. *Bro. of Locomotive Engineers*, 398 U.S. 281.

such as the Board. The Board has been accorded the same sovereign immunity enjoyed by the United States.[5] Moreover, in bringing suit to enjoin the state court proceeding here, the Board is seeking to protect, not private interests, but the regulatory scheme of the National Labor Relations Act from state impairment. See *Garner* v. *Teamsters Union*, 346 U.S. 485, 490; cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265. And, since an injunction can have a significant impact in a labor dispute and to attempt to remove it through state appellate procedures requires considerable time, a "frustration of superior federal interests" (*Leiter, supra*, 352 U.S. at 226) would ensue if the federal court were not free to act at the suit of the Board.[6]

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[5] Thus, actions against the Board have been dismissed on the ground that the suit is against the United States which cannot be sued without the consent of Congress. *Clover Fork Coal Co.* v. *National Labor Relations Board*, 107 F. 2d 1009 (C.A. 6); *Biggs* v. *National Labor Relations Board*, 38 LRRM 2728 (N.D. Ill.). Accord: *Blackmar* v. *Guerre*, 342 U.S. 512, 515 (suit against War Assets Administration); *Simons* v. *Vinson*, 394 F. 2d 732, 736 (C.A. 5) (suit against Department of Interior and Bureaus of Land Management and Indian affairs); *Cotter Corp.* v. *Seaborg*, 370 F. 2d 686, 691–692 (C.A. 10) (suit against Atomic Energy Commission).

See also *Gala-Mo Arts, Inc.* v. *Laiben*, 37 LRRM 2134 (E.D. Mo.) (Board Regional Director entitled to governmental immunity against suits for damages for acts performed in the course of official duties).

[6] The district court recognized that its holding could have this result (App. B, *infra*, p. 38):

> It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is par-

Nathanson v. *National Labor Relations Board,* 344 U.S. 25, relied upon by the Eighth Circuit in *Swift, supra,* 233 F. 2d at 232, does not require a contrary conclusion. In *Nathanson,* this Court held that, when the Board seeks to collect back pay due an employee from a bankrupt employer, it does not stand in the same position as the United States for purposes of determining priority of claims under the Bankruptcy Act; for, in a bankruptcy proceeding, the Board is asserting primarily the employee's private, rather than the national, interest. But in this case the Board is not asserting a private interest; it seeks to protect the regulatory scheme established by the National Labor Relations Act.[7]

This Court's very recent decisions in *Younger* v. *Harris,* No. 2, this Term, decided February 23, 1971, and associated cases, speak to an entirely different problem and to private plaintiffs, and so are not controlling here.

3. The question whether Section 2283 is applicable to suits brought by federal agencies to enjoin state court proceedings which impinge upon a field preempted by federal law, here the National Labor Re-

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ticularly relevant here where picketing activities are involved and * * * Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

[7] *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U.S. 81, also relied on by the Eighth Circuit in *Swift*, is fully consistent with this analysis, for it, too, involved no issues of national policy.

lations Act, is of manifest administrative importance. In the particular context of the Labor Board, the question has a significant bearing on the relation between federal and state courts in labor disputes affecting interstate commerce. A prompt resolution of the issue by this Court is thus warranted.

[8] The state's right to enjoin mass or violent picketing does not justify a ban on all picketing or other forms of peaceful concerted activity. See *Youngdahl* v. *Rainfair*, 355 U.S. 131, 139–140; *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 729–735. Portions of the injunction here limit the picketing to bona-fide members of the Union, and then only to those who submit themselves to the jurisdiction of the state court; prohibit the pickets from "[i]nstigating conversations with [the Company's] customers in any matter relating to the dispute herein"; and bar persons other than qualifying pickets from causing "to be published or broadcast any information pertaining to the dispute between the parties hereto" (*supra*, pp. 4–5). These provisions excesively restrict the exercise of peaceful concerted activity, and thus conflict with the National Labor Relations Act. See *Hill* v. *Florida*, 325 U.S. 538; *Tyree* v. *Edwards*, 287 F. Supp. 589 (D. Alaska), affirmed, *sub nom*, *Alaska* v. *Int'l. Union of Operating Engineers*, 393 U.S. 405; *Garner* v. *Teamsters Union*, 346 U.S. 485, 499–500; *National Labor Relations Board* v. *Servette*, 377 U.S. 46; *National Labor Relations Board* v. *Fruit & Vegetable Packers*, 377 U.S. 58; *Bro. of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 385. Moreover, the state injunction also enjoins the pickets from "[d]oing any act in violation of Sections 28–812, 28–814.01 and 28.814.02 R.S. Neb. 1964" (*supra*, p. 5). These provisions (App. D, *infra*, pp. 43–44) not only ban mass picketing and acts of physical coercion against persons desiring to work, but also "loitering about, picketing or patrolling the place of work * * * of such person * * * against the will of such person." Given such excessive breadth, they tend to chill the exercise of purely peaceful picketing. See *Thornhill* v. *Alabama*, 310 U.S. 88, 99–101, 104–105.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
JEROME N. WEINSTEIN,
Attorney,
National Labor Relations Board.

MARCH 1971.

APPENDIX A

United States Court of Appeals for the Eighth Circuit

No. 19,983

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES, APPELLEE

and

No. 19,993

NATIONAL LABOR RELATIONS BOARD,

v.

NASH-FINCH COMPANY, D/B/A JACK AND JILL STORES, A DELAWARE CORPORATION AUTHORIZED TO DO BUSINESS IN THE STATE OF NEBRASKA, APPELLEE,

v.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DISTRICT UNION 271, APPELLANT

[December 2, 1970.]

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

417-729—71——3

Before GIBSON and LAY, Circuit Judges and HUNTER, District Judge.

HUNTER, *District Judge:* This case is before us on appeal from an order of the United States District Court for the District of Nebraska dismissing an action for injunctive relief instituted by the National Labor Relations Board against Nash-Finch Company, d/b/a Jack & Jill Stores. The Board's complaint, brought pursuant to 28 U.S.C. Section 1337,[1] sought to restrain the Company from proceeding under or from enforcing an injunction issued by the District Court of Hall County, Nebraska, against Amalgamated Meat Cutter and Butcher Workmen of North American, AFL–CIO, District Union 271 and persons in active concert and participation with it, on the grounds that such injunction regulated conduct preempted by the National Labor Relations Act and interfered with the Board's exclusive jurisdiction over the subject. The Union by motion unsuccessfully endeavored to intervene as a party plaintiff in the action, and also has appealed.

The District Court in a carefully considered unpublished opinion ruled against both the Board and the Union. Upon consideration of the various issues presented on appeal, we affirm.

BACKGROUND

In August, 1968, the Union began an organizing campaign among the meat department employees of the Jack & Jill stores in Grand Island, Nebraska. The Union demanded recognition based on signed author-

[1] 28 U.S.C. § 1337 gives a District Court jurisdiction of questions arising under an Act of Congress; see, *Capital Service* v. *N.L.R.B.*, 347 U.S. 501 (1954); *Amalgamated Clothing Workers of America* v. *Richman Brothers*, 348 U.S. 511.

ization cards, and the Company expressed what it termed a good faith doubt of the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board for an election.

On October 9, 1968, the Union filed unfair labor practices against the Company alleging violations of Section 8(a) (1) and (5) of the Labor Management Relations Act. The Board's Regional Director investigated the charges regarding certain Company conduct at its Grand Island and Hastings, Nebraska stores and on January 7, 1969, issued an unfair labor practice complaint concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union. The Company denied the alleged unfair labor practices.

Following the statutory hearing, the trial examiner on April 28, 1969, found that the Company had violated Section 8(a) (1) and (5) of the Act by refusing to bargain with the Union as the exclusive representative of its employees in an appropriate unit, by suggesting the substitution of non-Union in place of Union representation, by soliciting employee revocation of prior Union authorizations as bargaining agent, by advising employees not to attend Union meetings and by coercively interrogating employees concerning Union representation. The trial examiner recommended inter alia, that the Company cease and desist from soliciting employee revocation of Union designation cards, suggesting the substitution of non-Union representation, advising employees not to attend Union meetings, coercively interrogating employees concerning Union representation and in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights

under the Act. The trial examiner also recommended that the complaint be dismissed as to allegations of unfair labor practices not specifically found to have been engaged in. The Company filed exceptions to the recommended decision.

Approximately one month after the issuance of the trial examiner's recommended decision, and before the Board's decision, the Union began picketing the Company's Grand Island, Nebraska stores with signs advising the public that the Union was striking in protest of the Company's unfair labor practices. The Union also distributed handbills stating the Company refused to bargain or comply with other findings or recommendations of a trial examiner of the National Labor Relations Board and urged the public not to shop at the Company's stores.

On September 17, 1969, the Board reversed the trial examiner's decision and concluded that the Company had not violated Sections 8(a) (1) and (5) of the Act by refusing to bargain with the Union, and that the Union had not represented a valid majority of the Company's employees when the bargaining demand was made. The Board concluded the Company had violated Section 8(a)(1) by its other actions and it entered a cease and desist order in that regard.

On May 27, 1969, the Company filed a petition for injunctive relief in the District Court of Hall County, Nebraska against the Union, its officers and certain individual pickets, alleging that the Union's picketing as engaged in included threatening and intimidating customers, stopped, blocked, and prevented free ingress and egress of the public to and from the picketed premises and constituted mass picketing, in violation of Section 28—814.02 of the Nebraska Revised Statutes. Shortly thereafter the state court issued its in-

junction which limited the Union's picketing in certain respects.[2]

On August 27, 1969, the Board filed a complaint in the Federal District Court of Nebraska against the Company, seeking to restrain the Company from enforcing or attempting to enforce those parts of the state court temporary injunction alleged to violate Article VI, Clause 2 (The Supremacy Clause) of the Constitution of the United States because it conflicted with the National Labor Relations Act, and other parts of the injunction claimed to restrain peaceful picketing[3] and to be within the area arguably preempted by the National Labor Relations Act.

Upon motion by the Company, the federal district court dismissed the complaint, relying on 28 U.S.C. Section 2283 which provides, "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." It also dismissed the Union's motion to intervene as a party plaintiff.

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[2] The Union was limited, inter alia, to two pickets at each store; enjoined from distributing certain handbills, from blocking entrances or exits to the store, from conversing with the store's customers and from picketing in violation of the mentioned Nebraska statutes.

[3] No record testimony was taken in the district court regarding the factual situations surrounding the picketing. Appellant denies that only peaceful picketing occurred, stating in its brief that there were blocked entrances, nails in parking lots, property damage and a series of bomb threats. Because of our finding that the federal district court was without authority to enjoin the state court proceeding, we do not reach the question of whether the state court had power or jurisdiction to issue the order restraining the primary picketing. See, *Atlantic Coast Line R. Co.* v. *Engineers*, . . . U.S. . . . (1970).

FIRST CONTENTION

On this appeal the Board contends that the National Labor Relations Board is the United States for the purpose of 18 U.S.C. Section 2283, and therefore that provision is not a bar to the issuance of a federal district court injunction. It cites and relies on *Leiter Minerals* v. *United States*, 352 U.S. 220 (1957).

We recognize that in a long line of decisions it has been decided that the prohibition of Section 2283 does not apply to the United States as a party seeking an injunction of state court proceedings. *Leiter Minerals* v. *United States, supra; Machesky* v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969); *United States* v. *Wood*, 295 F.2d 772 (5th Cir. 1961); *Studebaker Corp.* v. *Gittlin*, 360 F.2d 692 (2nd Cir. 1966); *Baines* v. *City of Danville*, 337 F.2d 579 (4th Cir. 1964), *cert. den.* 381 U.S. 939; *Brown* v. *Wright*, 137 F.2d 484 (4th Cir. 1943); *U.S.* v. *Farmers State Bank*, 249 F. Supp. 579 (D. S.D. 1966); *Sobel* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968). However, the Board's contention and rationale that it is to be treated as the United States since it is an agency of the United States, and, therefore that Section 2283 does not bar the issuance of an injunction has been unsuccessfully asserted by it over the years, and has been firmly rejected by this court in *N.L.R.B.* v. *Swift & Co.*, 233 F.2d 226 (8th Cir. 1956). We quote from that decision, loc. cit. 232:

> "The Board, citing *United States* v. *United Mine Workers of America*, 330 U.S. 258, 272, 67 S. Ct. 677, 91 L. Ed. 884, asserts that statutes which in general terms divest previously-existing rights will not be applied to the sovereign without express words to that effect, and then contends that as an agency of the United States it must be considered in the same light as the United States for the purpose of the construc-

> tion of the applicability of section 2283. The authorities cited by the Board do not support its contention that it has acquired all the privileges and immunities of the United States. For example, we think *Nathanson* v. *National Labor Relations Board,* 344 U.S. 25, 73 S. Ct. 80, 97 L. Ed. 23, cited by the Board, negatives the Board's contention. It was there held that a debt owed the Board was not entitled to preference as a debt owed the United States. The intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.,* 311 U.S. 81, 61 S. Ct. 485, 85 L. Ed. 595."
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> * * * * *
>
> "The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283."

Thus, in *Swift* and in other decisions it is established that the intention of Congress to bestow the privileges and immunities of the United States upon agencies created by the United States must be clearly demonstrated. As in *Swift,* there is no demonstration here that Congress intended to exempt actions brought by the National Labor Relations Board from the limitation imposed by Section 2283, and we are not justified in extending the exemption doctrine applicable to the United States to that Board. As stated by the Supreme Court in *Amalgamated Clothing Workers, supra,* 514: "By that enactment [Section 2283], Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation,"[4]

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[4] To the same effect, see, *Norwood* v. *Parenteau,* 228 F.2d 148 (8th Cir. 1955), cert. den. 351 U.S. 955 (1954).

Many of the problems of state-federal relationship which Congress sought to avoid by enacting Section 2283 would not be avoided if by judicial improvisation we extended the doctrine of the *Leiter* case to include federal agencies not specifically granted the cloak of sovereignty by statute. The *Leiter* case, supra, involved the United States itself and not an agency of the United States.

We again hold that for the purpose of Section 2283 applicability, the National Labor Relations Board is an administrative agency of the United States, and is not the United States. We further hold that Section 2283 is applicable to the National Labor Relations Board as a party seeking to enjoin a state court injunction or state court proceedings.

SECOND CONTENTION

The Board next contends that the area covered by the state court injunction has been preempted by Congress, and is within the exclusive jurisdiction of the National Labor Relations Board. Therefore, the Board asserts, Section 2283 does not apply as the state court is wholly without jurisdiction over the subject matter.

This contention of a general federal preemption of picketing so as to preclude applicability of Section 2283 previously has been unsuccessfully urged by the Board, and others, in other cases. In *Swift, supra,* loc. cit. 230, this court ruled the contention against the Board, citing and quoting from *Amalgamated Clothing Workers of America* v. *Richman Brothers,* 348 U.S. 511, 515–516. There, speaking for the Supreme Court Mr. Justice Frankfurter stated: "In the face of this carefully considered enactment, [Section 2283]

we cannot accept the argument of petitioner and the Board, as amicus curiae, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions."

We further declared in *Swift*, loc. cit. 516, that: "The [Supreme] Court, 348 U.S. at page 518, 75 S. Ct. at page 457 also fully answers the contention made in our present case, that if a State action is not halted the Federal labor relations plan will be disrupted, by stating that the State courts have for many years adequately protected Federal rights, and that. 'The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reinforced by a desire to avoid direct conflicts between state and federal courts.' "[5]

Even more directly to the point, is the recent case of *Atlantic Coast Line R. Co. v. Engineers*, . . . U. S. . . . (1970), in which a federal district court enjoined a railroad from invoking an injunction issued by a Florida state court prohibiting certain picketing by the

[5] The anti-injunction statute has been on the books in some form since 1793. See, Act of March 2, 1793, Ch. 22, §5. 1 Stat. 335; Durfee & Sloss, Federal Injunction against Proceedings in State Courts: The Life History of a Statute, 30 Mich. L. Rev. 1145 (1932).

Union.[6] Speaking through Mr. Justice Black, the Supreme Court reversed and declared: "First, a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear. This rule applies regardless of whether the federal court itself has jurisdiction over the controversy, or whether it is ousted from jurisdiction for the same reason that the state court is. Cf. *Amalgamated Clothing Workers* v. *Richman Bros.*, supra, at 519–520, 99 L. Ed. at 609–610, 75 S.Ct. 452. This conclusion is required because Congress itself set forth the only exceptions to the statute, and those exceptions do not include this situation. Second, if the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be *'necessary in aid of'* that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to "protect or effectuate" judgments. Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."

* * * * *

[6] *Atlantic Coast Line R. Co.* v. *Brotherhood of Engineers*, . . . U.S. . . . (1970), held that the prohibition in 28 U.S.C. § 2283 can not be evaded by addressing an order to the parties or by prohibiting utilization of the results of a completed state court proceeding. See also, *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4 (1940); *Hill* v. *Martin*, 296 U.S. 393 (1935).

"Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of § 2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion."

We conclude there has not been any general preemption of the field so as to deprive the state court of jurisdiction over the subject matter and to cause Section 2283 to be inapplicable in a federal court proceeding to enjoin enforcement of a state court injunction.

THIRD CONTENTION

The Board further contends that if Section 2283 is applicable, the questioned activities are within the ambit of Sections 10(j) and 10(l) of the National Labor Relations Act and therefore within the "as authorized by an Act of Congress" or "in aid of its jurisdiction" exceptions to Section 2283. However, the Board has not issued a complaint in the instant case which will allow it to seek an injunction under the terms of 10(j) or 10(l) of the National Labor Relations Act.[7] The picketing in this case which has been enjoined by the state court has never been made the subject of an unfair labor practice charge or complaint.[8] The state court injunction does not concern itself with a refusal to bargain, interrogation of employees or solicitation of employees to withdraw from the Union or with any other matter before the Board in its unfair labor practice complaint of January 7, 1968.

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[7] 29 U.S.C. § 160 (j) and (l).

[8] The federal trial court found "the picketing in question is not involved in the complaint issued by the Board on January 7, 1969."

Thus, the Board is not in a sound position on the record before us to successfully contend the requested federal injunction falls within the statutory exceptions "as authorized by an Act of Congress" or the "in aid of its jurisdiction," and in the light of the teachings in *Atlantic Coast Line R. Co. and Amalgamated Clothing Workers of America, supra,* we find no merit in the Board's contention in that regard.

The Board cites *Capital Service, Inc.* v. *N.L.R.B.*, 347 U.S. 501 (1954). There, the Company had filed suit in the state court for an injunction against the Union and had also filed with the Board a charge of unfair labor practice against the Union. Each had as a basis the same conduct of the Union. The state court enjoined all picketing of retail stores. The Regional Director issued an unfair labor practice complaint of a limited nature and petitioned the federal district court for an injunction restraining such conduct of the Union pending final adjudication by the Board, as required by Section 10(l) of the Act. Simultaneously with the filing of the Section 10(l) petition, the Board filed suit in the same court asking that petitioner be enjoined from enforcing the state court injunction. The district court granted a preliminary injunction restraining the employer from enforcing the state court injunction. The Supreme Court affirmed, holding that the injunction issued by the District court was "necessary in aid of its jurisdiction" and thus permitted under the exceptions specifically allowed by Congress. However, *Capital Service, Inc.*, is clearly inapplicable here, for as earlier noted, there has not been any application by the Board for an injunction to restrain activities upon which a complaint has been issued by it. Nor are we confronted in the instant case with the same basic activity as that which

the state court had before it, for 10(j) and (l) has not been followed so as to present any picketing issue to the federal court.

Thus, we have concluded the federal district court correctly decided that in view of the limitations placed on it by 28 U.S.C. Section 2283 it did not have power to issue the relief requested by the Board.

MOTION TO INTERVENE

We also accord with the district court's denial of the motion of the Union to intervene entered after the trial court had determined it did not have power to grant the relief requested by the Board and dismissed the Board's complaint. Since the plaintiff—the Board—had not brought its action within any of the exceptions to Section 2283, no proper purpose would be served by permitting the requested intervention. *Collins* v. *Laclede Gas Co.*, 237 F. 2d 633 (8 Cir. 1956); *Rosso* v. *Commonwealth of Puerto Rico*, 226 F. Supp. 688 (D. P.R. 1964).

In accordance with the reasons given above, the judgment of the district court is affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed District of Nebraska, January 6, 1971, by Richard S. Peck, Deputy

JUDGMENT

NOS. 19983–19993. SEPTEMBER TERM, 1970

No. 19983

NATIONAL LABOR RELATIONS BOARD, APPELLANT

v.

NASH-FINCH COMPANY, D/B/A JACK & JILL STORES, A DELAWARE CORPORATION AUTHORIZED TO DO BUSINESS IN THE STATE OF NEBRASKA, APPELLEE

No. 19993

NATIONAL LABOR RELATIONS BOARD

v.

NASH-FINCH COMPANY, D/B/A JACK & JILL STORES, A DELAWARE CORPORATION AUTHORIZED TO DO BUSINESS IN THE STATE OF NEBRASKA, APPELLEE

v.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, DISTRICT UNION 271, APPELLANT

APPEAL FROM the United States District Court for the_____District of Nebraska.

THIS CAUSE came on to be heard on the record from the United States District Court for the_____ District of Nebraska and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

December 2, 1970.

Costs taxed in favor of the appellee:

Printing 25 copies of brief of appellee in Nos. 19983 and 19993, $130.19.

Total costs of appellee, $130.19, for recovery from appellants in the U.S. District Court.

A true copy.

Attest:

ROBERT C. TUCKER,
Clerk, U.S. Court of Appeals.
Eighth Circuit.

December 31, 1970.

APPENDIX B

[Caption Omitted in Printing]

MEMORANDUM AND ORDER, FILED SEPT. 26, 1969

VAN PELT, *Judge*: This matter comes before the Court on the motion of the National Labor Relations Board for a preliminary injunction to prevent the Nash-Finch Company (doing business as Jack & Jill Stores) from enforcing a state court injunction issued by the District Court of Hall County, Nebraska. The state court injunction restrains certain actions of individuals engaged in picketing Jack & Jill Stores in Grand Island, Nebraska. The picketing in question occurred during an attempt by Amalgamated Meat Cutter and Butcher Workmen of North America, AFL–CIO, District Union 271 to organize the meat cutters employed by Jack & Jill.

Also before the Court is the motion of Amalgamated to intervene as a party plaintiff in this action. Finally, Nash-Finch has filed a motion to dismiss the complaint. By agreement of counsel, all three motions were argued at a hearing held before this Court on September 12. The court, at the conclusion of that hearing, took submission of the motions. The matters raised by the motions now stand ready for determination.

It is the opinion of the Court that the jurisdictional question raised by the defendant, Nash-Finch, is dispositive of the case. We turn now to an examination of the power of this Court to grant the relief that the N.L.R.B. requests.

This matter is properly before this court under 28 U.S.C.A. § 1337 giving jurisdiction of questions arising under an Act of Congress to the District Courts. The National Labor Relations Act is such an Act. *Capital Service* v. *N.L.R.B.*, 347 U.S. 501 (1954).

However, in the instant case, this court is asked to restrain the enforcement of a state court injunction. In such a situation, there is a rigid limitation on the power of this court to act. 28 U.S.C.A. § 2283 provides:

> "A Court of the United States may not grant an injunction to stay proceedings in a State Court except as authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

The history of Section 2283 indicates that it is to be strictly construed and a particular case must be within the exceptions that are set out by the statute in order for an injunction to issue. *Amalgamated Clothing Workers of America, et al.* v. *Richmond Brothers, Co.* 348 U.S. 511 (1955). Thus, in order for the relief herein requested to be granted, the N.L.R.B. must bring itself within one of the above noted exceptions to Section 2283 or, in the alternative, show that this section does not apply in the instant case.

The N.L.R.B. offers three arguments to the effect that this Court has the authority to issue the injunction that is asked for. First, the Board argues that under the rationale of *Leiter Minerals, Inc.* v. *U.S.*, 352 U.S. 220 (1957), when the United States is the party applying for an injunction restraining state court proceedings, Section 2283 does not apply. Thus, the Board as an agency of the United States Government would also be excluded from the prohibition of Section 2283.

Secondly, it is argued that Section 2283 does not apply here as the state court is wholly without juris-

diction over the subject matter in that it has invaded a field preempted by Congressional legislation. See, e.g., *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959).

Finally, it is the Board's contention that the picketing in question is involved with the organizational activities which have been continuing over a period of time. In connection with these activities, an unfair labor practice charge has been filed with the Board by the Union. 29 U.S.C.A. §§ 160(j) and (l) authorize the Board to seek injunctive relief in specific circumstances concerning unfair labor charges. Thus, the Board argues, if this Court finds Section 2283 applicable to the instant case, the questioned activities are within the ambit of sections (j) and (l) and therefore within the "as authorized by an Act of Congress" or the "in aid of its jurisdiction" exceptions to Section 2283. *Capital Service* v. *N.L.R.B.,* 347 U.S. 501 (1954).

In examining the first contention of the Board, it is noted that the Court of Appeals for this Circuit has held that the Board did not stand in the position of the United States for the purposes of determining the applicability of Section 2283 in a suit for injunctive relief. *N.L.R.B.* v. *Swift & Company,* 233 F. 2d 226 (8th Cir. 1956). It is the position of the Board, however, that the United States Supreme Court's decision in *Leiter Minerals, Inc., supra,* has undermined the Court of Appeal's holding on this point. We believe that a careful examination of *Leiter* and other relevant cases in this area does not bear out this contention.

We begin with the proposition that the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly demonstrated. *Recon-*

struction Finance Corporation v. *J. G. Menihan Corp.*, 312 U.S. 81 (1941). The Court of Appeals in *Swift & Company, supra,* found that

> "The Board has not demonstrated that it was the intention of Congress to exempt actions brought by it from the limitations imposed by section 2283." *Id* at 232.

We are of the opinion that in the instant case the Board has not established that it was the intention of Congress to bring it within the immunity of the United States insofar as concerns section 2283. While the *Leiter* case does establish the inapplicability of section 2283 to the United States, we find no justification in extending this doctrine to the National Labor Relations Board as an agency of the Government. To be considered is Mr. Justice Frankfurter's statement in *Amalgamated Clothing Workers, supra,* at 514 where he considers the import of the 1948 amendment to the predecessor of section 2283 which represents the section as it appears today.

> "By that enactment, Congress made it clear beyond cavil that the prohibition is not to be whittled away by judicial improvision."

We also are of the opinion that the Supreme Court's decision in *Amalgamated,* while bearing more directly on the second contention of the Board, also supplies compelling support for the position that the Board is not to be excluded from the prohibition of section 2283. This will be noted in the discussion of the pre-emption issue raised by the Board.

The Board next argues that the area covered by the state court injunction is within the exclusive jurisdiction of the N.L.R.B. and thus section 2283 does not apply. We feel that this argument is met squarely by the Supreme Court's findings in *Amalgamated Clothing Workers, supra.*

"In the face of this carefully considered enactment [§ 2283], we cannot accept the argument of the petitioner and the Board, as amicus curiae, that § 2283 does not apply whenever the moving party in the District Court alleges that the state court is 'wholly without jurisdiction over the subject matter, having invaded a field preempted by Congress.' No such exception had been established by judicial decision under former § 265. In any event, Congress has left no justification for its recognition now. This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.

"We are further admonished against taking the liberty of interpolation when Congress clearly left no room for it, by the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartley Act is self-determining or even easy. As we have noted in the *Weber* case, 'the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.' 348 U.S. at 480. What is within exclusive federal authority may first have to be determined by this Court to be so." *Amalgamated Clothing Workers, supra,* at 515–16.

Thus, while we note, although not deciding, that the complained of picketing in the instant case may be within the exclusive jurisdiction of the N.L.R.B. by virtue of the *San Diego Building Trades Council* case, this without more does not remove the limitation on this Court's power to grant the injunctive relief requested.

This would also reenforce our determination that the Board should not be considered as having the Government's immunity to section 2283. If this Court

may not exercise its equity power to ban state courts from federally preempted areas, then there is no logic to the argument that the Board as administrator of the preempted areas and being vested with exclusive jurisdiction therein, should enjoy the exclusion from the operation of section 2283 when it seeks to protect this jurisdiction. Section 2283 provides that the Board will be exempt when the Court is "authorized by an act of Congress" to issue injunctive relief. The National Labor Relations Act in 29 U.S.C.A. 160 §§ (j) and (l) provides a remedy to the Board to protect this jurisdiction.

Thus, it is our conclusion that unless the Board can bring itself within one of the exceptions to section 2283, this Court is powerless to act in the case before us.

Preliminary to a discussion of this Court's authority to grant relief requested under sections 10(j) or 10(l) of the Act. It is necessary to set forth the chronology of events leading up to the instant case.

An unfair labor charge was filed by the Union with the Board on October 9, 1968 alleging unfair labor practices on the part of the company. A complaint was issued on January 7, 1969 and a hearing was held thereon on February 11 and 12, 1969. The Trial Examiner's Decision and Recommended Order was issued April 28, 1969.

The Trial Examiner found that the Company was engaged in unfair labor practices in that it refused to bargain with the Union as the exclusive representative of the employees in the appropriate unit, suggested the substitution of non-Union representation for Union representation, by soliciting revocation of prior Union authorizations, and by advising employees not to attend Union meetings and by coercively interrogating employees not to attend Union meetings and

by coercively interrogating employees concerning Union representation (Exhibit B, filing #1). No mention of picketing is found in the Trial Examiner's Decision or Recommended Order. After the issuance of the Decision, the Company took exception to the findings and the case is currently pending before the Board.[1]

Approximately one month after the issuance of the Trial Examiner's Decision, the Union commenced picketing the Jack & Jill Store in Grand Island, Nebraska.

On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against the picketing. The court granted the requested relief on June 25, 1969 and issued a temporary injunction.

It will be noted that no charges concerning the picketing have been filed by the Company or the Union with the N.L.R.B. The Board has made no examination of the picketing either with regard to Union or Company activity.

Section 10 (j) of the Act reads:

> "The Board shall have the power, upon the issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order." 29 U.S.C.A. § 160 (j)

Thus it would appear that for this Court to entertain a request for relief in a 10(j) proceeding, there

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[1] On September 21, 1969 an article appeared in the Lincoln Evening Journal indicating that the National Labor Relations Board had found for the Nash-Finch Company, thus rejecting the findings of the Trial Examiner.

must exist, as a prerequisite to the Board's application, a complaint which has as its basis the activities in question. *National Labor Relations Board* v. *Swift & Company,* 233 F. 2d 226 (8th Cir. 1956). As has been noted, the picketing in question here has not been the basis for the issuance of such a complaint. This being the case, it is the conclusion of this court that under the circumstances, section 10(j) does not authorize us to avoid the prohibitions of section 2283. We note that we do not determine that section 10(j) would allow this Court to exercise its jurisdiction should all proper prerequisites be met, leaving this question for future determination.

The question next arises as to whether section 10 (l) affords a proper basis upon which to issue the relief requested. In this regard, the Board relies upon *Capital Service Inc.* v. *N.L.R.B.*, 347 U.S. 501 (1954). In this case, the manufacturer filed an unfair labor practice charge against the union concerning picketing activities. He also filed suit in a California state court for injunctive relief. The Board issued an unfair labor practice complaint against the union on a limited basis and instituted a 10 (l) proceeding in the United States District Court for an injunction restraining certain activities occurring during the course of picketing. Approximately one month prior to this, the California state court had issued the requested relief. In the 10 (l) proceeding, the Board asked that injunctive relief issue against the state court injunction; the United States Supreme Court held that as the state court injunction and the properly requested injunctive relief from the District Court touched the same basic activity, the District Court had properly restrained the state court injunction within the meaning of the "in aid of its jurisdiction" exception to section 2283.

Thus, if we were, in the instant case, faced with an application by the Board for an injunction to restrain activities upon which a complaint had been issued, and were also confronted with a state court injunction which would interfere with the exercise of this Court's jurisdiction over the subject matter, we would be bound under the *Capital Service* case and the policies of the N.L.R.A. to restrain the enforcement of the state court decree. This is not the case here, however. The picketing in question is not involved in the complaint issued by the Board on January 7, 1969. If and when this complaint reduces itself to final adjudication by the Board and the Board applies to this Court for appropriate relief in a 10 (l) proceeding, the activities of the Company and those of the Union picketing are sufficiently separate to allow this Court to draft a decree against the Company without involving the picketing activities. See *N.L.R.B.* v. *Swift & Co. supra.*

It is the conclusion of this Court that it does not have the power by virtue of the limitations imposed upon it by section 2283 to issue the requested relief.

It may be pointed out that such a holding leads to the rather anomalous result. It could be argued that, in view of our holding, an employer may successfully frustrate Board action by applying to a state court for injunctive relief rather than filing an unfair labor practice charge with the Board. This is particularly relevant here where picketing activities are involved and, as noted earlier in this opinion, Supreme Court decisions indicate that Congress may have preempted this area to a large extent. We are also mindful that when picketing activities are required to be vindicated through lengthy appellate procedures, much of the impact of such activities as an economic weapon against the Company is lost.

The United States Supreme Court in *Amalgamated Clothing Workers, supra,* at 520, poses a question which is yet to be answered and upon its determination, may provide a remedy for situations such as the Board and Union are faced with in the instant case. Mr. Justice Frankfurter notes that it has not yet been decided whether a company's application to a state court for an injunction covering federally preempted employee rights under § 7 and § 8(a)(1) of the Act, may, in itself, constitute an unfair labor practice. See Footnote 6, at 520. Thus, if this were so, the Union could file an unfair labor charge with the Board upon which a complaint could issue and, at that time, the Board could invoke the injunctive power of the Court under sections 10 (j) or 10 (l).

Our decision today does not cut off the Union or the Board from their rights of appellate review in both state and federal courts. Rather, we conclude that, under the factual situation found here, Congress has precluded this court from acting, seeking instead to maintain the traditional dichotomy of the federal and state courts. We assume, as it proper, that federally protected rights will be vindicated in state courts to the same extent that they would find vindication in the federal courts.

In view of the above,

IT IS ORDERED that the motion of the National Labor Relations Board for a preliminary injunction, being filing #2, should be and hereby is overruled and denied.

In view of our disposition of the case, we do not feel it necessary to determine on the merits the motion of the Union to intervene in this action. It will be noted that counsel for the Union appeared and was heard on matters touching all three motions at the September 12th hearing.

IT IS THEREFORE FURTHER ORDERED that the motion of the Union to intervene, being filing #3, should be and hereby is overruled and denied.

Finally, as it is this Court's determination that we are without jurisdiction to grant the relief requested.

IT IS THEREFORE FURTHER ORDERED that the motion of the defendant Nash Finch to dismiss, being filing #6, should be and hereby is sustained and the complaint is dismissed.

Dated: September 26, 1969.

By the Court:

ROBERT VAN PELT,
Judge, U.S. District Court.

APPENDIX C

Temporary Injunction Issued by the District Court of Hall County, Nebraska

[Caption Omitted in Printing]

Journal Entry

I, M. E. Moses; Clerk of District Court of Hall County Nebraska do here by certify the foregoing copy to be a full, true and correct copy of the original record thereof: Now remaining on file in said court: this 25th day of June 1967. M. E. Moses, Clerk of District Court, By Margaret Kozel.

This matter came on for hearing before the court on June 12, 1969, on plaintiff's application for a Temporary Injunction. Upon evidence adduced and this Court being fully advised in the premises, this Court finds that:

A. "Pickets" as involved in this action, are persons visibly displaying a sign on the person as set forth in Sec. 28–814.02 of laws of Nebr.;

B. That identity of individual pickets is necessary for the enforcement of any order of this Court;

C. That plaintiff is entitled to a temporary injunction of limited scope until the further order of the Court.

It is, therefore, ordered that upon approval of plaintiff's bond:

1. No person other than bona-fide members of defendant union shall engage in picketing unless such person shall have first submitted himself or herself

to the jurisdiction of this Court by filing a general appearance herein as a defendant in these proceedings;

2. Pickets are limited to two at each Grand Island store location and pickets are enjoined from:

(a) Distributing hand bills or literature pertaining to the dispute along or upon public streets and highways in any manner which halts or slows the movement of traffic;

(b) Blocking or picketing entrances or exits to plaintiff's retail stores in Grand Island;

(c) Instigating conversations with plaintiff's customers in any matter relating to the dispute herein;

(d) Doing any act in violation of Sections 28–812, 28–814.01 and 28–814.02 R.S. Neb. 1964.

3. That no person, other than a picket or the named defendants, shall, on behalf of defendants, in any manner whatsoever picket or loiter about the premises of plaintiff's Grand Island stores or disrupt ingress and egress thereto, nor display signs or distribute hand bills or literature or cause to be published or broadcast any information pertaining to the dispute existing between the parties hereto.

4. Bond to be deposited by plaintiff is fixed in amount of $5,000.00.

DONALD H. WEAVER,
District Judge.

JUNE 19, 1969.

APPENDIX D

The relevant portions of the Nebraska anti-picketing statutes, Sections 28–812, 28–814.01 and 28–814.02 R.S. Neb. 1964 provide, as follows:

> 28–812. *Picketing, defined; unlawful.* It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purposes; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the

place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

28–814.01. *Mass picketing; unlawful.* It shall be unlawful for any person, singly or in concert with others, to engage in or aid and abet any form of picketing activity that shall constitute mass picketing as defined in section 28–814.02.

28–814.02. *Mass picketing; defintion display of sign required.* (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28–812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

U.S. GOVERNMENT PRINTING OFFICE: 1971